

THE FACTS

I

PRODUCTION OF THE PAPERS

The OSD Task Force Volumes, Exhibits 1 through 18, were prepared by a task force in the Office of the Secretary of Defense, in the Department of Defense. The study was requested by Robert S. McNamara and continued under Clark M. Clifford who became Secretary of Defense in March of 1968. The final typing of the study was completed under Secretary of Defense Melvin Laird, who assumed that office in January of 1969. The chain of command for the study originally went from McNamara to Morton H. Halperin and from him to Leslie Gelb. Later when Clark Clifford became Secretary of Defense, Paul C. Warnke was introduced into the chain of command (Gorman P. 11021-22. General Gorman joined the Task Force in its inception in mid 1967 and remained through the Spring of 1968. During this period, the study group was his principal duty (P. 9112) and he was second in command to Gelb supervising the support staff and studies up until 1960 (P. 9115-16).

The individuals who wrote the studies, included military officers, civilians who were working in the Pentagon, and civilians from think tanks, including the Rand Corporation, as well as from universities. Approximately 36 individuals worked on the study for an average of three to four months each. There was also a secretarial support staff which averaged five to ten people (Gorman P. 9114-16; Gelb letter, Defense Exhibit , introduced into evidence at P.).

The study group had no budget of its own. The individuals

involved were paid by their employees. No estimate was made of the total cost. Gorman's salary is not in evidence, nor is Gertov's or Ellsberg's salary for the period for which they were on the Task Force. Halperin's salary is estimated at approximately \$25,000.00 during the period in which he devoted approximately 5% of his time to the Task Force over an 18 month period.

No evidence was presented on who worked on what studies listed in Counts II - VII, what their salary was or how long they took to write each study.

As each study was completed, five copies were made, plus some additional working copies. Later fifteen copies of all the studies were made. The five original copies were made in the JCS reproduction facilities at the request of Col. Gorman (P. 11027, 11032).

The studies were classified according to General Gorman's testimony by Dr. Gelb (P. 9122) and according to Dr. Halperin's testimony based on a joint conversation between Gelb and Halperin. The prosecution introduced no evidence as to the criteria used in classifying the study. Halperin testified that the Top Secret Classification was based simply on the fact that Top Secret documents were used in writing the study and on the notion that any important Vietnam papers sent to the Secretary of Defense was classified "Top Secret".

II

SHIPPING THE THIRTY-EIGHT VOLUMES TO RAND AND STORAGE AT RAND, D.C.

In December, 1968, Paul C. Warnke, Assistant Secretary of Defense for International Security Affairs, Morton H. Halperin, Deputy Assistant Secretary of Defense for International Security Affairs, and Leslie Gelb, Acting Director of the Policy and Planning Staff in the Office of the Assistant Secretary of Defense for International Security Affairs and Director of the OSD Vietnam Task Force decided to store Warnke private papers, McNorton private papers and thirty-eight of the Task Force Volumes. Halperin called Henry Rowen, President of the Rand Corporation,⁴ to ask whether Rand would be willing to store that material. Following that conversation, Halperin directed Gelb to prepare a memorandum which is in evidence as Defense Exhibit B-1. Copies of B-1 were sent to Rowen and to Lawrence Henderson, Vice-President of the Rand, Washington office.

In January of 1969, Chief Fox who was working for Dr. Gelb at the direction of Gelb and Halperin packed five boxes, including the thirty-eight OSD Task Force Volumes in the Warnke and McNorton private papers. Fox prepared a list of the material and took them to the Rand Corporation, Washington office.

At the Rand office, Alton Archer, Administrator and Security Officer for the Rand Washington office received the documents and signed a receipt for five boxes. He then put the material in safe drawer No. 82 (Government Exhibits).

No one at the Rand Washington office conducted an inventory of the contents of the five boxes, entered the material on the Rand Top Secret Log, gave the material Top Secret Control numbers, or attached cover sheets to the volumes. According to the testimony of Lawrence Henderson, the Top Secret Control Officer at the Rand Washington office was never informed of even the presence of the material, including the thirty-eight volumes at the Rand Washington office. Best testified that such a procedure was not in conformity with the Rand Manual or the Industrial Security Manual (P. 12331-335). Henderson testified that it was not in conformity with the Manual but it was required by the terms of the agreement (B-1) as he understood them. Best testified that the documents were not assigned to a specific contract (12391) and that if they had been received under a contract, they would have been logged in (12413).

The twenty Task Force volumes which remained at the Rand Corporation Washington office through the end of the Indictment period were kept in the same state until returned to DoD officials in June, 1971. That is, they were never inventoried and entered on TS logs, given TS numbers or have TS access sheets attached to them, nor was the Rand Top Secret Control Officer at the Rand Washington office ever informed of their existence at Rand.

III

DANIEL ELLSBERG PICKS UP THE VOLUMES AT THE RAND DC OFFICE

On March-and August-Daniel Ellsberg came to the Rand Washington office. Subsequent to that time, he had established with Lawrence Henderson that he had a clearance and a need to know in connection with the DoD Contract and the approval of two of the three of Halperin, Gelb and Warnke to have access to the Task Force Volumes and to take them to the Rand Santa Monica office. Halperin testified that this approval had been given by Halperin and Gelb.

Ellsberg signed the receipt for ten and later eight volumes and was given a courier pass thus gaining authorized possession of the documents. Henderson cannot recall the substance of any conversations with Ellsberg at the time he picked up the volumes. According to Best testimony, the phrase "approved destination" in the courier pass meant for Top Secret documents that it was to be given to the Rand Top Secret Control Officer (12154). According to Henderson, who signed the courier pass and gave it to Ellsberg, the phrase "approved destination" meant simply the Rand Santa Monica office and "no particular location" at the Rand Santa Monica Office. Best testified that he was not aware of the existence of the agreement in Defense Exhibit B-1 until after the period of the Indictment (11949, 12811).

Best testified that by receiving the documents with the courier pass Daniel Ellsberg had authorized access to the documents (11993) and that he continued to have authorized access between the periods August 20, 1969 to May 20, 1970 (11999).

Best, Henderson and Halperin all testified that the courier pass did not authorize Daniel Ellsberg to take the volumes to the Sinay Advertising Agency or to give them to Sinay, Thai or Russo.

IV

DANIEL ELLSBERG'S POSSESSION OF THE EIGHTEEN VOLUMES

The only substantial divergence in the facts comes on the question of where Daniel Ellsberg kept the eighteen volumes during the period up until May 20, 1970 or thereabouts, when he gave them to Richard Moorstein. The Government's position as presented in the testimony of Richard Best, Ellsberg was obliged to turn the documents over to the Rand Top Secret Control Officer. He did testify that if Daniel Ellsberg kept them in his Top Secret safe this would have been proper storage (12354,12356). The Government has such implied that not only did Ellsberg not check the documents in with the Top Secret Control Officer but that he did not keep them in the Rand Corporation at all. That was said by the testimony of Jan Butler that she did not find any of the eighteen volumes in Daniel Ellsberg's safe during her semi-annual inventory (P. 12687). However, Butler also testified that she only looked through what was on the inventory sheet (12716,1219-21). She also testified that after the volumes were picked up from Richard Moorstein and put in her safe, she did not list them on the inventory which she conducted in November, 1970 (P. 12825). The Government offered no other testimony as to the location of the documents between March and August, 1969 and May, 1970, except for the testimony by Sinay of the appearance of some blue-covered volumes at the Sinay Advertising Agency during the two week period between July and December of 1970.

Moorstein testified that he saw blue-covered volumes which were volumes of the Pentagon Papers in Daniel Ellsberg's safe and borrowed such volumes on at least one occasion (12517,12619). He could not identify them as these particular eighteen volumes and

did not know whether they had Top Secret access sheets on them (12520).

Moorstein, under cross-examination made a variety of statements about the volumes which he saw in Ellsberg's office. He said, for example that: "Perhaps these volumes were in the possession of Daniel Ellsberg" (1252). That he saw volumes such as these in Daniel Ellsberg's office (12517). That on at least one occasion and perhaps more, he borrowed the volumes (12517). He testified that it would be extremely unusual for Top Secret documents not to have cover sheets (12527). And later that he had never before or since seen Top Secret documents without a cover sheet (12621-22) but could not remember whether on this occasion the documents had cover sheets (12520) or whether he signed the cover sheets (12522). He is also unclear on how many times he had seen the volumes in Ellsberg's safe and testified once that "On some occasions, he saw copies of the study in Daniel Ellsberg's safe (12618) and had a feeling that he borrowed them on more than one occasion." (12622). He also testified that he was instructed not to inform anybody who was not on the access list of the existence of the study at the Rand Corporation (12560).

Best testified that Daniel Ellsberg had a Top Secret safe (12354) and that keeping them in that safe would be proper storage (12856). He testified that there was no search of all the Top Secret safes at Rand until after the period of the Indictment and that therefore she would not have found material if it was kept in a Top Secret safe but not shown to her (12718) and that she would not find it if the material was in Rowen's safe (12744).

Butler testified that during this period there was no request of Daniel Ellsberg to turn over these volumes to her or to anyone else (12808).

She testified that although she did not log the documents in until December 31, 1970, a highly unusual lag (12824,12686) but the documents were nevertheless in proper storage from May to December even though they were not in the system (12809).

V

XEROXING AND POSSESSION BY RUSSO, et al

That Daniel Ellsberg and Anthony Russo used the xerox machine some time in the latter half of 1969. (12910, 12874). She testified that all of the xeroxing took place over a ten day to two week period (12910). That she was present between four and eight times and there may have been ten additional times (12909). She testified that the xeroxing took place at night (12910).

She stated that Dan brought to the office in a briefcase documents of the size and color of exhibits 1 through 18, that the documents were taken apart and later reassembled, and that one or two copies were made. She testified that there was no cutting of the originals (12922) but that she had cut off the Top Secret markings from the copies (12922). She testified that she was instructed not to read the documents and did not read them (12936). She testified that Russo assisted in the xeroxing (13001) but did not read any of the blue covered volumes (13002). Sinay testified that Thai came up once during the xeroxing and went out to dinner with Ellsberg, Russo, and Sinay, but that he did not do any xeroxing (12910, 1295-96).

Fingerprint evidence was also introduced indicating which volumes had the fingerprints of Sinay, Thai and Russo.

Neither Thai or Sinay ever had a clearance (8448) and Best testified that Russo did not have any duties after August 29, 1969 (11849) in that his Rand clearance terminated on September 30, 1969 (11822) but that Rand cannot in fact cancel a clearance (11824).

VI

DANIEL ELLSBERG GIVES TO MOORSTEIN AND MOORSTEIN AND
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According to Moorstein, Daniel Ellsberg carried the documents into his office, he called Rowen and then Best and within an hour Butler picked the material (12493-95, 12593). Testified that this probably occurred in the afternoon (12592) and that it was not possible that it was overnight, all of these events taking place in a single day (12593). Butler testified that when she arrived at work at 8:15 in the morning of May 20th there was a note telling her to pick up some Ellsberg material from Moorstein (12685). She testified that she assumed that Daniel Ellsberg was not at Rand on May 20th since an authorization was used to open his safe, (12699). Butler also testified that there was no investigation after she received the documents on May 20th until their publication in June, 1971 (12803) and that Daniel Ellsberg continued to have access to Top Secret material at Rand after May 20th (12807-808).

VII

THE DOCUMENTS WERE GIVEN TO THE DEPARTMENT OF DEFENSE

Following the publication of some of the information of the Pentagon Papers in the New York Times and other newspapers in June of 1971, the Rand Corporation turned the volumes over to the Department of Defense. The turn-over of the eighteen volumes named in the Indictment was by Best to Bonn of the Department of Defense, following which Bartimow maintained custody in the Pentagon (8446).

Henderson testified that he secured approval of Gelb, Warnke and Halperin to give the volumes to the Department of Defense and his memo so states.

IX

GURTOV'S STUDY

Gurtov worked on the study group on the Task Force in the Pentagon on the study of the Geneva Conference of 1954. He worked there for approximately three months but did not complete that volume. (Gorman 9123-25). The Gurtov study was reproduced in forty-five copies at the Rand Corporation on 31 July 1968 (11856) and became the copy named in the Indictment sent to the Rand Top Secret Office on August 2, 1968 (12690). Daniel Ellsberg was given access on April 2, 1969 and returned the volume on May 20, 1970 (12691,693). According to Best, Daniel Ellsberg was authorized to have possession of Exhibit 20 between April 2, 1969 and May 20, 1970 (11926). Best also testified that Ellsberg was never told his possession was unauthorized (11928).

The classification in the document was authenticated by an official of the Advance Research Projects Agency (11883-85).

According to Best, Ellsberg had no permission to copy or remove the documents from Rand or to give it to Sinay (12160,12693).

X

JCS MEMORANDUM

The eight pages of the JCS memorandum were logged into the Rand Top Secret Control Office on March 13, 1969, having been brought to Rand by Daniel Ellsberg (12693,12695). On October 3, 1969, Ellsberg checked out the volume and returned it on October 17, 1969 (12696-12697). According to Best, Ellsberg was authorized to have possession of the document, Exhibit 19, between October 3, 1969 and October 17, 1969 (11931,11940). Best testified that Ellsberg had no authority to give the document to Sinay, Thai or Russo (12158), nor did he have permission to copy (12697).

DePuy testified that the Wheeler document was classified by General Wheeler himself (8497) and he testified as to the course of the trip to Vietnam which General Wheeler took (8497).